

In the Matter of the Application)
Regarding the Conversion and Acquisition)
of Control of Premera Blue Cross and its)
Affiliates,) Docket No. G02-45
)

PREHEARING CONFERENCE
March 3, 2003
Tumwater, Washington

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BY:

EXAMINATION

COMMISSIONER KREIDLER

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1 BE IT REMEMBERED that on Monday, March 3, 2003, at 1:02 p.m.,
2 at 555 Israel Road Southwest, Tumwater City Hall, Tumwater,
3 Washington, before Mike Kreidler, Insurance Commissioner of
4 the State of Washington, the following proceedings were had,
5 to wit:

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7 <<<<< >>>>>
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9 COMMISSIONER KREIDLER: Let me call the meeting to
10 order and begin by saying good afternoon and expressing my
11 appreciation to the City of Tumwater for making your Council
12 chambers available to us today.

13 Today is Monday, March 3, 2003, and it's 1:00 p.m. My
14 name is Mike Kreidler, and I'm the Insurance Commissioner for
15 the State of Washington. Seated to my right is Carol Sureau,
16 Deputy Commissioner of Legal Affairs, and to my left
17 Christina Beusch, Assistant Attorney General.

18 And this proceeding is a prehearing conference to
19 discuss the parties' joint draft proposal concerning expert
20 reports, discovery procedures and schedule, availability of
21 documents, and the hearing schedule, and the other matters
22 raised in the briefs filed by the parties on February 27,
23 2003, and to review the status of this matter.

24 A court reporter is present and will record the verbal
25 comments of this proceeding and will hereafter transcribe the

1 record. Unfortunately, this facility does not have telephone
2 conference capabilities, and no phone line is available for
3 persons who choose to call in and listen.

4 On February 10, 2003, I issued the Fourth Order in this
5 matter, along with other things, setting the hearing date,
6 time, and place. All parties were served with this order.

7 As the parties are aware by now, Premera made the
8 initial Form A statement regarding conversion and acquisition
9 of control of Premera Blue Cross by its affiliates on
10 December 17, 2002, and supplemented that filing on
11 September 27th and October 25th. On October 24, 2002, I
12 issued the First Order, the case management order which,
13 among other things, addressed the time frame for completing
14 my review and of -- review of and decision about Premera's
15 application to be acquired -- oh, it's all one sentence
16 here -- application to be acquired by a for-profit
17 controlling entity.

18 On November 1, 2002, Premera filed an objection to that
19 order, and a hearing was held on that objection on
20 November 26, 2002. On December 23, 2002, I issued the Third
21 Order ruling on Premera's objections, concluding that
22 Premera's Form A statement was not complete, and discussing
23 the statutory time frames. On January 21, 2003, Premera
24 filed a petition for judicial review of the Third Order with
25 Thurston County Superior Court.

1 On February 10, 2003, I issued the Fourth Order on the
2 motions to intervene, directing that all petition -- that all
3 petitioners be allowed to intervene with respect to the
4 relevant issues raised by their petitions as to which they
5 offer information or expertise different or beyond that
6 offered by Premera or OIC staff. I conditioned this
7 intervention on their acceptance of certain groupings and
8 discovery and hearing procedures to ensure efficiency and
9 avoid redundancy and unnecessary delay.

10 That order also noted the present prehearing conference
11 and directed parties to confer with respect to preparation of
12 expert records, discovery procedures and scheduling,
13 availability of documents, and adjudicative hearing schedule.
14 Those matters were to be addressed in a joint proposal filed
15 on February 27, 2003, with the disputed items noted.

16 The present proceedings will provide the parties an
17 opportunity to present their positions with respect to the
18 disputed items and will -- and will review the current status
19 of the review process.

20 Premera and then OIC staff will each be afforded 15
21 minutes to present their positions on the items addressed by
22 the joint proposal that remain in dispute. I have been
23 informed that intervenor groups have agreed to have their
24 position represented by Eleanor Hamburger, a lead attorney
25 for the Premera Watch Coalition. Ms. Hamburger shall then

1 have 15 minutes to present the intervenor groups' petition --
2 position.

3 Let me point out that a strict time limit will be
4 somewhat loose on that given the narrowness of the people
5 that are participating and so that we have some flexibility
6 on that within reasonable limits.

7 It would be particularly helpful to me if the presenter
8 will address each disputed issue in turn, attempt to outline
9 their position and explain the reason for that position. I
10 have questions -- I may have questions during each
11 presentation and may direct those questions to the current
12 presenter or other lead attorney. If the presenter's time is
13 significantly curtailed by such interruptions, I may exercise
14 my discretion to allow additional time.

15 I will not issue any rulings today but will issue a
16 written order addressing the items addressed by the joint
17 proposal expeditiously. With that, who do we begin with?
18 Premera here? Premera, I guess, gets to take the lead on
19 that.

20 Just ask you to state your name, and spell the name; the
21 court reporter finds it much to her assistance.

22 MR. KELLY: My name is Tom Kelly, K-e-l-l-y,
23 Preston Gates & Ellis, representing Premera in this matter.
24 With me at counsel table is my partner Rob Mitchell, and John
25 Domeika from Premera is also present here today.

1 We would like to reserve a good portion of our time for
2 a rebuttal to other comments because I think our position is
3 pretty straightforward. I believe the best way to deal with
4 the joint proposal is to perhaps go through the headings that
5 we presented, because some of the agreed issues appear at the
6 beginning, and the disagreements come up later on in the
7 document.

8 On page 2 of the -- of our joint proposal, we talk about
9 appointment of a special master for discovery issue, and we
10 were all agreed on the appointment of a special master, and
11 also about what we would respectfully submit as a proposed
12 procedure for the special master to follow.

13 And I think in a nutshell it is an attempt to have the
14 special master deal expeditiously with any discovery
15 disputes, and it also provides for an appeal process to you,
16 as the Commissioner, from the special master's decision and
17 very much imitates the appointment of special masters in
18 federal and state court. And I don't think there's really --
19 we worked on that pretty hard and got it pretty much
20 resolved. Got it resolved. I shouldn't say "pretty much."

21 On page 4 we turn to the proposal as to who should be
22 appointed as special master. And here, too, I think we are
23 in close agreement, if not complete agreement. I'll let the
24 others address that more directly. But we recommended the
25 appointment of one of three individuals, and we recommended

1 in that order Mr. Finkle, Mr. Carroll, and Ms. Pekelis, whose
2 rTsumTs were attached to the report, because I think all the
3 parties recognize that they had the expertise and the ability
4 to quickly resolve matters that we were looking for.

5 The only area of dispute, as far as we were concerned,
6 if those names are acceptable to you, was over the question
7 of payment of the special master. Premera was willing to pay
8 for the time for the special master to get up to speed and
9 for the other activities of the special master, but wanted to
10 have a provision where if, vis-a-vis Premera and the
11 intervenors only, leaving aside the OIC, if there was a
12 dispute and one side prevailed, that the party that didn't
13 prevail would have to pay the special master's cost, that is,
14 as between Premera and the OIC only -- the intervenors. I'm
15 sorry.

16 We heard back from the intervenors on that point, and
17 they indicated they were not willing to pay the loser-pay
18 provision. And after consulting with our client, we are
19 prepared to propose to go forward paying all of the special
20 master's costs, fees and costs. But we think that because
21 there needs to be control at any time over a potential abuse
22 of the process, that just as you, the Commissioner, would be
23 able, if we went directly to you on a discovery matter, and
24 one party or the other was found to have made a
25 nonmeritorious proposal or a nonmeritorious objection, it

1 would be within your power to assess attorney's fees to be
2 paid by the losing party.

3 So we think that if that provision is in place for the
4 special master as well, that the special master could award
5 attorney's fees, either against Premera or against the
6 intervenor, that would be a satisfactory approach and meet
7 all reasonable concerns and objections about misuse of the
8 special master.

9 Yes, sir?

10 COMMISSIONER KREIDLER: If I might, is this a
11 reasonable standard that we're talking about here? What's
12 the standard that would be measured as to whether it would be
13 paid for or not?

14 MR. KELLY: I believe it would be within the
15 discretion of the special master, and it would presumably --
16 it's really up to the special master, but I would think it
17 would probably be if there was -- if the special master
18 concluded that the -- either the objection or the request
19 were without substantial merit.

20 COMMISSIONER KREIDLER: Okay.

21 MR. KELLY: But that, I think, is a detail that the
22 parties could work out, and in fairness, we're still doing a
23 little bit of negotiating here even as we talk.

24 COMMISSIONER KREIDLER: If we could, Ms. Sureau has
25 a question.

1 MS. SUREAU: Mr. Kelly, so is the proposal that
2 Premera would pay for the attorney's fees for the
3 nonprevailing party or the nonmeritorious side? Would it
4 also be the special master's fees related to that? Is it
5 just the attorney's fees or the special master's fees as
6 well?

7 MR. KELLY: Well, I think there's -- Let's start
8 the other way. The special master's fees, we would have to
9 pay all of those, but in certain situations if either the --
10 Premera or the intervenor abused the system in the view of
11 the special master, then the special master would say, "You
12 have to pay their attorney's fees."

13 MS. SUREAU: Just the attorney's fees.

14 MR. KELLY: Just the attorney's fees.

15 MS. SUREAU: Thank you.

16 MR. KELLY: So I think we're very close to that. I
17 think everyone recognized it would be very helpful to the
18 Commissioner and valuable to the parties, the informality,
19 frankly, of being able to operate very quickly and the
20 certainty would be helpful for us.

21 Okay. We are -- page 5, the entry of a confidentiality
22 agreement and protective order, we're working on that. And I
23 am certainly confident we will be able to get a
24 confidentiality agreement and a proposed protective order,
25 hopefully a stipulated one for you to review and enter as you

1 see appropriate.

2 Well, that's the good news. The area where there is
3 dispute and where I think I'll devote most of the rest of my
4 time is to preparation -- is to the schedule. You know, I
5 think the most interesting thing is -- one of the most
6 interesting things is that you sent out your Fourth Order
7 just 21 days ago, and we're all here today. We've done a lot
8 of work. We got the job done.

9 That's the way things work for lawyers. Probably not
10 for the rest of humanity, but I can at least speak for
11 lawyers, and for consultants. And until there are firm
12 deadlines in place, I'm afraid there's just going to be
13 slippage after slippage after slippage. And we -- and I
14 think there's a particular risk of that in terms of the
15 consultants in this case. I'm not casting aspersions, but
16 this is human nature.

17 If -- consultants, like anyone else, can always think of
18 another question to ask, another interview to have, another
19 document to search for. And usually the constraint on that
20 is that the client, the customer of the consultant says, "I'm
21 not going to pay for that. I'm afraid we're just going to
22 have to get on. Life is too short."

23 Here that constraint doesn't exist. Because of the
24 unusual nature of this proceeding, Premera has to pay for all
25 of the work of the consultants. So there's no constraint on

1 the consultants to stop asking questions. And we think that
2 that, to a large extent, is what's happening here, and again,
3 time has gone by. Recriminations aren't probably going to
4 gain much, but we are saying let's go forward, at this point
5 forward.

6 Now, Mr. Mitchell can speak in more detail, if I ever
7 give him any time, about the actual production of documents.
8 But in summary, there have been 35,000 pages produced. There
9 have been, I think -- is it 40 interviews that have occurred?

10 MR. MITCHELL: Forty interviews.

11 MR. KELLY: And we just think they have the data to
12 do the work. They were hired as consultants, and if you look
13 back through their application, they've said, "Well, we've
14 done it before lots of times. We have all the people you
15 need to get the job done." I mean, Pricewaterhouse, I was
16 astounded, has 150,000 employees worldwide. I don't think
17 they're all devoted to us, but looking at some of the --

18 MS. BEUSCH: Not yet.

19 MR. KELLY: -- recent bills, it looks like they're
20 trying.

21 On a serious note, we're talking about hundreds of
22 thousands of dollars a month that are now being devoted to
23 the special -- to the consultants. And this really needs to
24 be constrained. We need to get moving. They said they can
25 do it in a short period of time. I'm confident they can.

1 But like everyone else, just as with your order, until you
2 say here's the deadline, it isn't going to happen.

3 So that's what we're asking for. We were the only ones
4 who came up with a deadline, which is what we thought you
5 wanted. And we basically had a 90-day deadline. 30 days
6 out, we said, you should be able to get these final records
7 of reports out so we can start deposing those experts. And
8 then 30 days -- at the end of that 30 days -- we think that's
9 all we need to do this discovery along with the
10 intervenors -- we would have our prefiled testimony, our
11 experts ready so that they can be deposed by the OIC and by
12 the intervenors and vice versa. And then we should be ready
13 to go to a hearing.

14 We believe that this case is -- you're having public
15 hearings; that's a separate track, which we're not --
16 certainly will be plenty of time for but for -- or public
17 presentations for this hearing. These are judgments calls
18 that you need to make. You will be getting sophisticated and
19 thorough, certainly, by this time, expert reports and counter
20 reports perhaps.

21 And we really -- that's the heart of this hearing. I
22 don't know that there'll be any laywitnesses. But we
23 proposed a limit on the laywitnesses because, again, you,
24 like anyone else, you can always think of a laywitness to
25 call if you want. And this should be prefiled testimony.

1 That's the way administrative hearings are done.

2 I think, really, what the OIC's built into their what I
3 count as 284-days-starting-from-who-knows-when schedule -- I
4 mean, in fairness, it says well, once we -- once our
5 consultants tell us that everything is -- we've gotten all
6 the information we need, then we can go forward. Well, even
7 if that were to happen within the next two weeks, the kickoff
8 started, and they begin to put pen to paper, we'd be
9 celebrating Christmas probably before we even started this
10 hearing. And that just is not in the public interest, I
11 submit. It's not in the interest of this -- of the Insurance
12 Commissioner's duties and responsibility. And it's certainly
13 not in Premera's interests.

14 So with that in mind, we think you have to look at this
15 realistically, set key deadlines, and force people to comply
16 with them. And we will -- kind of like building, we'll come
17 to it. Set deadlines for us and we'll meet it. That's what
18 judges do to us, and that's how it gets done.

19 In brief, we propose that we could have a hearing by
20 June 9th, allowing 30 more days for the experts and the OIC
21 staff to get their work done. Even if you were to say,
22 "Well, we're going to have -- as Rob and Mr. Hamje got
23 together and said -- well, we think we've already produced
24 all the documents needed and so forth." But if there's some
25 dispute, certainly those should be resolved by March 14th.

1 And then if you were to give the OIC staff another 45 days
2 for their consultants to prepare reports, that would bring it
3 to the end of April. It would basically bump our proposed
4 schedule out to July 9th or the equivalent. Still much too
5 long.

6 In saying all this, we're not waiving our objections
7 that this isn't going to get done within 60 days. But given
8 where we are, we think that June 9th is the right day for the
9 hearing and July 9th would be more than generous to comply
10 with any arguments that they may have to the contrary.

11 I'm sure I have gone beyond my 15 minutes, and I
12 apologize for that.

13 COMMISSIONER KREIDLER: Let me add, Mr. Kelly, that
14 that is a question that I will have for some of the other
15 parties, get a little more definition on that particular
16 issue. So it won't be the last time we revisit it.

17 MR. KELLY: Excuse me for a minute. Okay. Thank
18 you.

19 COMMISSIONER KREIDLER: Great. That concludes
20 Premera at this point, right?

21 MR. KELLY: I ask for some additional rebuttal
22 time.

23 COMMISSIONER KREIDLER: Sure.

24 MS. SUREAU: Mr. Kelly, if I could just ask at
25 least one question. I noticed in the joint proposal that it

1 seemed to be Premera's position that they would like to have
2 the OIC staff and the intervenors' prefiled testimony filed
3 on one date and then have Premera's witnesses' testimony
4 filed at a later date; is that correct?

5 MR. KELLY: OIC staff at one date, and then Premera
6 and the intervenors at a later date.

7 MS. SUREAU: Later date.

8 MR. KELLY: That's correct.

9 MS. SUREAU: I was curious as to why you are --
10 wanted to have that kind of a staggered timing.

11 MR. KELLY: We think that all of our -- we've made
12 sort of our basic presentation in our application, and the
13 OIC's staff has those reports we've been waiting for. And we
14 obviously want to be able to respond to those reports, and we
15 think the intervenors want to respond as well.

16 But I don't think we -- I hope I'm catching your
17 question. I don't think we need further time for -- to
18 stagger it out three ways for us to -- for OIC staff to
19 submit theirs, and then us, then the intervenors. That, I
20 think, would distort the control of this proceeding here to
21 assist but not to delay.

22 MS. SUREAU: Okay.

23 MR. KELLY: And, you know, one of the interesting
24 things is in our draft efforts, drafting last week, the
25 intervenors first came up with a schedule which was quicker

1 than the OIC's schedule. And once the OIC produced their
2 schedule, the intervenors understandably dropped theirs.

3 There are certainly a lot of things that you can do to
4 schedule and give more time, but I think you need to really
5 cut to the quick here and see what you need to give a fair
6 decision in this case.

7 MS. SUREAU: One other question. I think it's
8 Premera's position that the prefiled testimony of the experts
9 should be limited essentially to the report and then the
10 rTsumT.

11 MR. KELLY: I would think that's the way they're
12 going to testify, even if we didn't have prefiled. What else
13 are they going to say? They're going to give a little bit of
14 background on who they are, give their rTsumT, and give their
15 report, and then their opinions from that report. So I don't
16 think that is extraordinary, but --

17 MS. SUREAU: So essentially your position would be
18 that anything else would be irrelevant. They should include
19 it in a report.

20 MR. KELLY: Right. And it's a little confusing, I
21 think, in the way we tried to write it on the rebuttal.
22 We're not saying that -- we recognize that the OIC experts
23 are going to have something to say, probably, about what our
24 experts had to say or what the intervenors had to say. To
25 me, that's the type of thing that can be done at the hearing,

1 as long as you stay within the scope of that response.

2 And if it is -- and we can put in an escape clause. If
3 there are true rebuttal witnesses -- and we would think they
4 would be nonexpert witnesses -- then you can apply to the
5 Commissioner for the permission to have those people. But to
6 build them in and create an additional delay is just not
7 logical.

8 COMMISSIONER KREIDLER: Thank you. Let's see.
9 Mr. Odiorne? Mr. Hamje?

10 MR. HAMJE: Thank you, Commissioner. I'm going to
11 go ahead and speak on behalf of OIC staff today, though I'm
12 certainly very willing to receive instruction from
13 Mr. Odiorne from time to time.

14 I think the first thing that I would like to address is
15 the issue of the special master. I think that's the first
16 thing Mr. Kelly brought up, and I think we should address it
17 so we can discuss the OIC staff's position on that. And of
18 course, we certainly agree about having a special master
19 appointed, and we agreed with the three nominees that had
20 been proposed.

21 We have some questions about the newest suggestion made
22 by Premera today relating to the attorney's-fees question. I
23 certainly am not aware of any statutory or regulatory
24 authority for the award of attorney's fees in administrative
25 proceedings before the Commissioner's office. So it would

1 seem to me, unless I am incorrect or someone is able to show
2 that there is some statutory authority for that, that it
3 would have to be by agreement of all the parties, and that is
4 in this particular case by the intervenor groups and Premera,
5 before that would be able to go forward.

6 Now, I would also propose, too, that in the alternative,
7 if this particular approach that is being proposed by Premera
8 is essentially agreed to by the OIC staff, other than the
9 question of the attorney's-fees issue, we certainly would
10 recommend that the Commissioner consider possibly other
11 potential appointees, and we were considering possibly Carol
12 Sureau as special master or Patricia Peterson, who are
13 already employees of the Office of the Insurance Commissioner
14 and would be in a position to be available to rule on
15 discovery disputes. But again our -- that is in the
16 alternative. We certainly hope that an agreement can be
17 reached with respect to the -- to Premera's proposal.

18 Now, let me talk now about the schedules and deadlines
19 and these kinds of things. This is the crux of where Premera
20 and the other parties disagree on this. We believe that it
21 is currently premature to set the deadlines for discovery or
22 to limit the number of witnesses or to limit the forms and
23 quantity of discovery or to even restrict testimony at the
24 hearing.

25 And simply, it's because -- and Mr. Kelly has indicated

1 it as well, that we really don't know what discovery people
2 are going to want. We don't really know what's going to
3 happen. In fact, there are so many variables still out there
4 that by setting a deadline -- setting deadlines now, there is
5 a danger that we will -- we will lose what the whole purpose
6 of this proceeding is.

7 Let me just talk about some of the variables. One of
8 them, of course, is when it is the State's consultants are
9 going to confirm that they have received substantially all of
10 the requested documents and information that they need to be
11 able to render meaningful opinions.

12 We also don't know how long it's going to take if
13 Premera desires to amend its proposal in response to concerns
14 already communicated to Premera by the OIC staff in
15 connection with the proposal and also in response to draft
16 reports that are going to be submitted by our consultants.
17 Premera may choose to make some changes in its application,
18 and if it does so, it may need -- if they're substantial, it
19 may need some time to do so to ensure that it has the best
20 chance of being approved.

21 And if they do make changes, there's going to have also
22 to be a need for some time, particularly if there are
23 substantial changes, for the consultants then to prepare
24 reports that reflect those changes in those reports so they
25 can be most helpful to the Commissioner in connection with

1 the decisions that have to be made by the Commissioner.

2 And another area that is still wide open and we have no
3 idea what's going to happen is with respect to the Alaska
4 situation. It is my understanding that today the Alaska --
5 new Alaska director is taking office. This is her first day
6 on the job. We don't know exactly what's going -- how things
7 are going to be affected here in Washington with respect to
8 this change in administration. And we are -- we have entered
9 into an interstate cooperation agreement with them, a
10 regulatory agreement with them to go ahead and cooperate with
11 respect to information sharing. So we have a relationship in
12 this process already that involves coordination.

13 We were informed -- the OIC staff were informed for the
14 first time on Friday that the Alaska division intends to
15 conduct an administrative adjudicative hearing in connection
16 with this transaction in Alaska. This raises other potential
17 issues of coordination and how these two proceedings are
18 going to go ahead and proceed.

19 It's also been -- we've also been advised that a
20 scheduling order will be issued in the near future by the
21 Alaska director in this connection. It's very important,
22 considering that there are some overlaps of issues between
23 Alaska and Washington, that there be coordination between our
24 consultants.

25 For instance, one of the issues, I believe, that will be

1 brought up for the Commissioner's consideration here is the
2 impact of the conversion on Premera's activities in Alaska.
3 That is specifically, I think, one of the issues that the
4 Alaska intervenor group has presented and asked to address in
5 these proceedings.

6 And it's -- I've also been authorized by the Alaska
7 Division of Insurance to inform the parties today that it is
8 the intention of the Alaska division to send out a letter to
9 you, Commissioner Kreidler, with copies to the parties
10 outlining generally what the Alaska director intends to do in
11 this connection. And so hopefully that will come in the next
12 week or so. But we cannot be absolutely certain because, as
13 I said, again, this is her first day on the job.

14 One other -- another area that as we progress along, if
15 we were going to go ahead and establish deadlines of some --
16 or a rigid schedule today, would be the question of how
17 discovery disputes might affect and impact the schedule.
18 That's another variable that we would have to deal with.

19 But really, when you get right down to it, the most
20 important factor now that we're concerned about is, when is
21 the data and information collection phase of this process
22 going to be complete. And as Mr. Kelly has pointed out --
23 and we have been working very hard in trying to develop a
24 method or process to accelerate this.

25 As you may have noticed, if you took the time and had

1 the magnifying glass to accompany your review of it, that the
 2 Attachment A, Exhibit A to the status report indicates that
 3 there's 116 items still open. And I believe I counted
 4 approximately 41 or 35 percent or so of those items that may
 5 very well be able to be cleared up by discussion or further
 6 clarification. And some of them just involve the opportunity
 7 for the staff consultants, State's consultants to review
 8 recently delivered documents and information so that they
 9 know what they got; then they can report on it.

10 But the danger at this stage, even though I think we're
 11 getting much closer to completion of this process, and
 12 because we are working towards doing precisely that and doing
 13 it as quickly as we can, if we set a rigid schedule for that
 14 date, there is a danger that there will be -- we could
 15 result -- or the result could be a gap in the record that
 16 would be impermissible under the circumstances. And I think
 17 we have to relate back to what the statutory context is in
 18 which the Commissioner, you, will be deciding this issue,
 19 this issue about the conversion.

20 And ultimately, it's not as you would think in the
 21 ordinary case, where the party that propounds a particular
 22 position has the burden to come forward and present evidence
 23 and argument, that they are right. And if they fail on their
 24 burden, well, then they lose, and you go the other way.

25 But here we have the legislature provided a different

1 type of approach, took a different type of balancing of the
2 process and said that the Commissioner shall approve unless
3 the Commissioner finds X, Y, Z, or whatever. And there's a
4 list in the two holding company acts of all the different
5 grounds upon which the Commissioner may disapprove a
6 particular transaction.

7 And if there is no evidence addressing that particular
8 issue, well, then the Commissioner cannot disapprove. And if
9 it turns out that there is evidence but it is still in the
10 hands of the proponent and the staff has not received it and
11 has not considered it, then it does a disservice to the
12 people of this state.

13 And so that's why we have to go forward and look and try
14 to find every single scrap of information that's relevant to
15 the issues in this matter. And if there is a rabbit trail,
16 determine that it's a rabbit trail and move on to an issue
17 that -- to another path.

18 It's important that the Commissioner have reasonable
19 assurance that the record is complete. And keep in mind,
20 when I say "the legislature balanced that," the other side of
21 that scale, as the legislature said, the Commissioner
22 determines when the record is complete. And that makes up
23 for the fact that the Commissioner is bound by what's in the
24 record to be able to decide adversely to the proponent's
25 position.

1 What we ask is that the Commissioner focus on the time
2 line leading up to the preparation and distribution of final
3 reports. And that is -- you know, that's really what
4 we're -- what we need to concentrate on right now. We're not
5 asking that a specific deadline be set out because once
6 the -- it has been determined and has been confirmed by our
7 consultants that the data collection phase is complete, then
8 that's when the dates start to come into place. That's when
9 50 days out the draft reports are submitted. And then beyond
10 that, then the legal reports, draft reports from our legal
11 consultants which have to rely upon the draft reports of the
12 other consultants to make their determinations.

13 Then they all can be out there, and then there's -- then
14 that's when the process begins where first we want to make
15 sure that there are no factual errors. So we ask that
16 Premera point out within 20 days after these reports are
17 completed, these draft reports are completed, that they point
18 out any factual errors so we can fix them. Because it's --
19 we're not playing a game of trauba (phonetic) ambush or some
20 kind of game like that in this process. The game is to get
21 all the information out on the table. And if these reports
22 have an error in them and they presume a piece of evidence
23 that is not accurate, that that could cause a problem, we
24 need to get those fixed as quickly as we can.

25 Also, it's important, again, that Premera have an

1 opportunity to respond to the concerns of the OIC staff. And
 2 of course, in the final reports these -- any changes should
 3 be addressed. We ask that the schedule have built into it
 4 flexibility because right -- of course, as you know, I can
 5 outline a few of the variables that we know we're facing now.
 6 Because I suspect as we move through this continued uncharted
 7 territory, that there's other issues that are going to arise
 8 which we had not anticipated. And we're going to have to
 9 deal with them on a case-by-case basis.

10 We do have some suggestions in that regard. We want to
 11 be sure that the parties are allowed to make and request
 12 adjustments in the process. We ask that there be -- that the
 13 prehearing conferences be set periodically so that we can
 14 review these issues and make sure that you, Commissioner, are
 15 apprised of what's going on in this process. And of course,
 16 we believe the proposal about the special master is a very
 17 good one.

18 And one thing to keep in mind, too, is that we're also
 19 suggesting that -- or not suggesting that there be no
 20 discovery right now. We are suggesting that, as soon as
 21 confidentiality agreements are executed between the
 22 intervenor groups, or intervenors and Premera, and as soon as
 23 a protective order is issued, that the intervenor groups can
 24 start and any of the parties can start issuing written
 25 requests for production of documents. We can start doing

1 that now. And we'd like to have a dispute-resolution or a
2 discovery-dispute-resolution process in place for that as
3 well at this time.

4 I guess the bottom line is what we would request,
5 Commissioner, that you -- request that you put in an order
6 that would result from this prehearing conference today that
7 would, first of all, be the appointment of a special master.
8 Second of all, establishing a discovery-dispute-resolution
9 process. Third, allow written requests for production, again
10 subject to the confidentiality agreement and the protective
11 order. Fourth, require that the OIC staff notice you and the
12 parties when the production of information and documents
13 phase is complete, that is when our experts say, the
14 consultants say we're ready to go and start on the draft
15 reports.

16 And now, at that time, then a prehearing conference can
17 be scheduled so that at the time -- just before the time or
18 right about the time the final reports would be due or would
19 be issued, that we can have a prehearing conference. And at
20 that time we can go through and start talking about
21 discovery -- other types of discovery, deposition schedules,
22 who the witnesses are going to be. Because then we'll have
23 an idea of what we're doing.

24 We're not thinking in terms of a vacuum right now
25 because we just haven't seen the reports. And reports are

1 what's really going to define the parameters of our inquiry
 2 in this proceeding. And also, we'll be able to talk about
 3 what the hearing's going to look like. It may not -- it may
 4 be necessary to have another prehearing conference to get
 5 into that after the discovery process is done. But we can
 6 also talk about how the -- how the prehearing testimony is --
 7 I'm sorry -- prefiled testimony is going to be handled. That
 8 also can be discussed at that time and try to get them all
 9 worked out at that time.

10 What we're suggesting is a step-by-step process rather
 11 than trying to develop a global approach now when we -- there
 12 are just so many variables. Just take it a step at a time,
 13 and just -- we'll deal it. This is something we know about
 14 now. Then we get in the next step. Then we'll deal with the
 15 next thing.

16 COMMISSIONER KREIDLER: Mr. Hamje, I think that, at
 17 least in part, the questions that were raised by the
 18 applicant relative to some kind of reasonable standard in
 19 this -- principally they were directing it toward who would
 20 pay if they didn't meet an appropriate standard.

21 But I think from the standpoint of the time lines that
 22 at some point, letting the clock continue to run with the
 23 consultants would be somewhat problematic. It's not
 24 unreasonable to say that it's in your -- their best interests
 25 to keep that going.

1 What kind of certainty can we bring to that that they
2 are being reasonable.

3 MR. HAMJE: Certainly we believe they are. The
4 OIC, we are monitoring their activity. We've -- if you take
5 a look at the -- at the Exhibit A attached to the status
6 report, you've seen the tremendous progress has been made.
7 We're down to, as I said, 116, I think, out of I don't know
8 how many were originally -- requests were originally made.
9 We have moved considerably.

10 But keep in mind -- and again, Premera has at one point
11 in time indicated that these consultants are the A team, and
12 that's exactly right. These are people that have had
13 experience with conversions in other states prior though this
14 time. These people are the people that know their business.

15 And you are going to want the benefit of their advice,
16 and you're not going to want to have a report that's going
17 to -- that's going to be before you in a hearing that's going
18 to say -- have a qualification that says, "Well, we were not
19 able to get information about X, and because of that, we
20 cannot opine about this or that or the other." And that's
21 not what you want. You want --

22 Now, there's going to be qualifications no matter what.
23 I'm sure that it will be written especially into the reports
24 by legal consultants -- but there will -- but as much as
25 possible we want to minimize those chances, and we have to

1 rely on the expertise of these folks as well. But we also
2 have to keep in mind that if the record does not have
3 evidence that is critical for you to make a decision, then it
4 means, based on the statutory scheme, that you cannot -- but
5 accept, approve the transaction based upon, you know, that
6 particular gap in the record.

7 COMMISSIONER KREIDLER: I guess I'm looking at,
8 maybe, is there some way of having -- some kind of a way of
9 appealing effectively and saying come on. What they're going
10 after right now is just carrying this on as an activity
11 without substantial expectation of having something that's
12 going to be a substantial feature of what's involved with
13 making a decision on this application.

14 MR. HAMJE: I gather from your question you're
15 concerned about the relevance of the requests, whether there
16 is a -- that the consultants are asking questions based not
17 upon something that's related to the issues in the preceding,
18 but may be more wide-ranging than it ought to be. Is that
19 what you're...?

20 COMMISSIONER KREIDLER: Correct.

21 MR. HAMJE: I want to make sure --

22 The way -- again, this is a new area for us all, and all
23 of -- many of us have different opinions about how this
24 matter should proceed.

25 First, I think we are making an effort working with

1 Premera to whittle down each of the open requests. And
 2 there's two ways to do it, clarification, and second,
 3 completion of production of documents. So there's a third, I
 4 guess, prong in this, too, when you talk about matters that
 5 Premera believes are privileged or confidential for some
 6 purpose that should not be provided.

7 The first two we're addressing. We have established a
 8 process that -- now that, for the first time, the number of
 9 open items is small enough so that we can actually attack
 10 them and work on them. Because before, when you're dealing
 11 with 500, it's just too many for us to get on the telephone
 12 to start talking about them. Although there has been a lot
 13 of going back and forth between -- on an ad hoc basis between
 14 the consultants and Premera staff.

15 But what we will -- what we're doing is, first of all,
 16 having, on a weekly basis, one or two telephone conferences
 17 that are going to specifically address open items and work
 18 through those. Then on the 14th, those that are remaining,
 19 the OIC staff and the consultants are going to sit down with
 20 Premera and hammer out the rest.

21 Now, then there is also the question of items that are
 22 privileged or confidential. There's not that many of them,
 23 but I think those are gonna be some of the toughest ones
 24 we're going to have to work on. In a January 7 meeting
 25 between the consultants and OIC staff and Premera, a

1 privilege log was promised. It's still being prepared. It
2 has not yet, to my knowledge, been delivered.

3 Then we will be able to sit down with them after we've
4 had a chance to review it and work on that and try to whittle
5 away at that particular item as well to determine what is
6 privileged, what is not. If it's privileged, is there a way,
7 you know, we can get ahold of the information if we need it.
8 Is there a possibility that Premiera would be willing to waive
9 the privilege under certain circumstances.

10 These are the kinds of questions we are having to deal
11 with, and we are close to this process. Again, we are
12 waiting on the privilege log, and we can begin working on
13 that once we receive it. And the others, I hope, by the
14 middle this month we're going to have a lot better idea so
15 that on the 21st we can go ahead -- I think that's the date
16 that was in the status report that we are going to go ahead
17 and report to you. I think that's the date that we were
18 asking that you would set a prehearing conference on that
19 date or shortly thereafter. And we would report to you after
20 our discussions on the 14th. That's how we're trying to
21 approach it.

22 I think that there is a possibility that, if we get to
23 the point and you have that prehearing conference after the
24 21st, that there are some items about which the staff and
25 Premiera cannot agree, then at that time it might very well be

1 useful for you to intervene and for us to discuss it on an
2 item-by-item basis. Hopefully by then we will have much less
3 than 116.

4 COMMISSIONER KREIDLER: Ms. Sureau?

5 MS. SUREAU: Mr. Hamje, thanks for all the
6 information. Very helpful.

7 I did have one question. It seemed in the joint
8 proposal you were suggesting that the -- we not schedule the
9 due date for the expert reports until a certain time period
10 after receipt of requested documents. My question is: So
11 the documents that you're waiting for that you want to
12 trigger the time for the expert reports to be filed, are
13 those documents that have already been requested?

14 MR. HAMJE: Yes.

15 Now, Ms. Sureau, please understand, too, that this is a
16 give-and-take situation. Because every time information is
17 provided, there is always a possibility that some additional
18 question will be raised. And I have been told by the
19 consultants that we're to the point now where, sometimes when
20 that does occur, instead of having additional questions in
21 the double or triple digits, it's now just in the single
22 digits. And it's even getting down to one, two, or three at
23 most. We are much closer than before. And the dates that
24 we've talked about or presented in our status report will
25 help us to bring this phase to closure.

1 MS. SUREAU: Let me ask the question another way:
 2 Would it be accurate to say that you have requested all the
 3 documents as of today that, if you got all the documents that
 4 you have requested as of today, say, you got them all
 5 tomorrow hypothetically, then we could schedule the expert
 6 reports due date 50 -- 57 days thereafter?

7 MR. HAMJE: We would have to have -- assuming that
 8 the consults tans were able to review all of the information
 9 tomorrow when they received it, yes.

10 MS. SUREAU: Thank you. I just had a couple other
 11 questions. I wanted you to speak to the issue of what the
 12 prefiled testimony would consist of. Now, Premera has taken
 13 that position that they think it should only be the reports
 14 and rTsumTs, curriculum vitae information. Could you address
 15 that? What would the OIC staff recommend?

16 MR. HAMJE: Although I think that that is one form
 17 that it could take, I believe it's too restrictive at this
 18 point. I believe that it's very possible that there will be
 19 issues raised or questions that will come up that will -- it
 20 would be more helpful to the Commissioner to have them
 21 specifically addressed in prefiled direct testimony rather
 22 than just, maybe, bring them up at a later time.

23 In other words, although the reports are going to refine
 24 the parameters of the issues and the parameters of the
 25 testimony, there may be elements or issues that are brought

1 out in deposition by other testimony that -- again, we're not
2 here to go ahead and play an adversary game back and forth.
3 We're here to get the evidence out so that the Commissioner
4 has everything.

5 And the way I see it is that it's better to go ahead and
6 have an additional paragraph in the prefiled testimony
7 directly addressing a point that's been raised so that the
8 Commissioner doesn't have to wait till the hearing to hear it
9 or to some later time, but can just look at it and there it
10 is in the testimony. So I -- that's why we resist limiting
11 the prefiled direct testimony of the consultants to just that
12 form.

13 MS. SUREAU: Thank you. Could you also speak to --
14 Premiera has suggested a cap on the number of nonexpert
15 witnesses. What would the staff's position be on that?

16 MR. HAMJE: Well, I would love to be able to have a
17 cap on all witnesses. We're not ready yet to -- we don't
18 know what we're going to need, how many witnesses we're going
19 to need at this stage. I would like to find out what the
20 reports are going to say. I would like to go ahead and then
21 take a look and relate back to what the issues are that the
22 Commissioner's going to have to deal with during the hearing.

23 Once we make that determination, it may be that we would
24 be willing to just have two laywitnesses. I just don't know.
25 That's what the biggest problem is here, is we just don't

1 know how much, what we're going to need to do for the
2 hearing. So it's just too early for that.

3 MS. SUREAU: Thank you, Mr. Hamje.

4 MR. HAMJE: If I could just say one other thing,
5 too, when you asked me that question about the consultants
6 receiving all of the data, and that that would be from that
7 date then they would be able to go forward, I do have to make
8 it clear that they would have to review it and then confirm
9 that they got what they asked. That all that I -- I want to
10 make that very clear. Because it's always a possibility that
11 when they receive documents, it may turn out not to be
12 everything they needed or they requested.

13 MS. SUREAU: Thank you.

14 MR. HAMJE: Thank you.

15 COMMISSIONER KREIDLER: Thank you, Mr. Hamje.

16 Ms. Hamburger?

17 MS. HAMBURGER: Thank you, Commissioner. And I'm
18 speaking today on behalf of the five intervenor groups, and
19 their attorneys are present, including Amy McCullough from
20 the Alaska intervenors, Mike Madden from the Washington
21 Hospital Associations, Dina Yunker from the UW School of
22 Medicine, and Jeff Coopersmith from the Washington State
23 Medical Association.

24 Just to take the issues that have been discussed by
25 Mr. Kelly and Mr. Hamje briefly, with regard to Mr. Kelly's

1 proposal regarding the special master, it's been our position
2 that it is efficient and appropriate to use any of the three
3 individuals proposed by Premera. But we believe that
4 Premera, under the holding company acts, is responsible for
5 those costs.

6 The statute does permit the Insurance Commissioner, if
7 it's deemed appropriate by the Commissioner, all reasonable
8 costs of a hearing held under this section. And we believe
9 that that includes the cost of the special master. And
10 that's under RCW 48.31C.030 5(b) as well as under the
11 equivalent section in 31B.

12 And so we think it's appropriate to similarly have those
13 costs paid for by Premera. Similar to Mr. Hamje, we do not
14 know of any provision that would permit the assessing of
15 attorney's fees. And I have not consulted with my colleagues
16 on this issue, but I suspect that if it's not authorized,
17 that we would not voluntarily agree to that.

18 That being said, there's -- we are confident that we can
19 participate in an efficient manner in discovery disputes in a
20 way that would not be in any way abusive of the process. We
21 have been efficient and timely in our participation in this
22 matter. We intervened way before any time lines were set.
23 We've been prompt at meeting all of our time lines and have
24 tried to minimize any additional time or impact of our
25 involvement on this transaction in terms of efficiency and

1 redundancy. And so while we support the concept of the
2 special master and the proposal offered by Premera for those
3 three individuals who -- although we might prefer
4 Mr. Carroll, Ms. Pekelis, and then Mr. Finkle in that order,
5 as opposed to the order suggested by Premera.

6 MS. SUREAU: Could you say that one more time?

7 MS. HAMBURGER: Terence Carroll, Roselle Pekelis,
8 George Finkle.

9 Returning the issue of scheduling, we have agreed with
10 the time frame that had been offered by the Office of the
11 Insurance Commissioner staff, and I just wanted to say --

12 COMMISSIONER KREIDLER: Ms. Hamburger?

13 MS. HAMBURGER: Yes?

14 COMMISSIONER KREIDLER: If Ms. Beusch could ask you
15 a question.

16 MS. BEUSCH: I'm likely to forget, with respect to
17 the cost, you cited the holding company statute talking about
18 all reasonable costs of experts. If we looked at the special
19 master as expert assistance, would you have a position if or
20 do you think the -- if the -- it -- if it was considered
21 unreasonable, on the most unlikely event that the special
22 master and the Commissioner would think the intervenors were
23 acting unreasonably, then do you think then that costs of the
24 master, not attorney's fees, that there's some legal
25 authority to have that, then, paid by the intervenors?

1 MS. HAMBURGER: I don't read there being any
2 authority for that in the statute. It simply says, "all
3 reasonable costs of the hearing under this section is
4 determined by the Commissioner." And then skipping a couple
5 of lines, "must be paid before the issuance of the
6 Commissioner's order by the acquiring person." And it
7 doesn't talk about any other entities or parties being
8 responsible for costs.

9 MS. BEUSCH: So if it was determined to be an
10 unreasonable cost, where would that cost fall or lie?

11 MS. HAMBURGER: I -- you know, my assumption would
12 be that the costs for discovery disputes -- I guess the
13 question is: Are all discovery disputes reasonable? And
14 what I don't know is -- and we'd be happy to send in some
15 written responses to this as we do more research. 'Cause
16 again, this is the first time we've heard Premera's proposal,
17 this latest proposal.

18 I don't know what other sanctions or alternatives are
19 available out there. But I don't see any provision within
20 this statute that allows for the assessment of costs on any
21 other entity other than acquiring party.

22 MS. BEUSCH: Okay. Thank you.

23 MS. HAMBURGER: But, you know, if you would like to
24 hear from us more than that, we would be happy to submit some
25 written statements regarding our thinking on that after we've

1 done research.

2 MS. BEUSCH: This is just a question that occurred
3 to me.

4 MS. HAMBURGER: That being said though, you know, I
5 think we fully intend to pursue this in a responsible,
6 meritorious, nonfrivolous manner. We are sure that there
7 will be close calls on discovery requests. And we hope that
8 we will only bring discovery requests that will be ultimately
9 successful.

10 But because of the complexity of this kind of case --
11 and you can already see given the difficulty that the OIC
12 staff and Premiera have had in determining what information is
13 going to be disclosed even to the OIC staff -- we anticipate
14 that there will be disputes, and we hope to minimize it as
15 much as possible through the use of a confidentiality
16 agreement and protective order. But, you know, we'll try our
17 best. But that being said, we anticipate there may be those
18 issues.

19 So in terms of the scheduling, you know, we support the
20 OIC staff's proposal for the time frames and believe that
21 they're in the best position to make sure that all of the
22 information that you need in order to determine whether this
23 transaction meets the standards under the holding company
24 acts is met. They're really in the best position with their
25 experts to determine that.

1 Mr. Kelly mentioned that our time frame was shorter than
2 the OIC's. And I just wanted to say that as far as -- to our
3 best count, it's probably about ten days shorter, not a
4 significant amount shorter. And we did not suggest any hard,
5 fast deadlines. What we did is very similar to what the OIC
6 suggested, is set a bunch of time frames given certain
7 activities. We didn't say there would be a hearing by
8 June 9th or July 7th or any of those specific dates for
9 precisely the same reasons that Mr. Hamje described.

10 We are very concerned about how disputes over discovery
11 may delay things, and we're trying our best to do this as
12 efficiently as possible. But we don't want any entity
13 running the time clock up to a deadline and then only having
14 a few days or a limited period of time to do the proper kind
15 of assessment of the information that's been gathered.

16 Also wanted to note that Premiera has complete control
17 over when the information that the OIC experts need is
18 delivered to the OIC. So while Premiera is arguing for this
19 to happen faster, they have control of the documents that the
20 OIC staff is trying to get. And we would urge that they
21 finalize the information that the OIC is asking for so we can
22 move forward altogether on this process.

23 It does sound from -- based upon Mr. Hamje's discussion,
24 though, that the parties are close. And so we would urge you
25 to consider their time line. We agree, in addition, that

1 it's too early to tell about any limitations on discovery,
2 witnesses, experts, and testimony. At this point, unlike the
3 OIC staff and Premera, we have no information except what we
4 have gotten from public disclosure requests about the
5 questions being asked by the OIC experts and the specific
6 details of the Premera conversion that have not been publicly
7 disclosed.

8 And given that we have even less information than the
9 OIC staff, we too feel that it is too early to put any limits
10 on what kind of testimony is going to be presented, what kind
11 of experts, the format of those expert reports, what kind
12 of -- all of that stuff, we just have no basis for making
13 anything more than just a guess at those kinds of limits.
14 And so we'd ask that you again delay making a ruling on those
15 kinds of issues until we're further into the process, we've
16 had a chance to do some discovery, take a look at what's
17 being produced, have our experts look at it, and so we can
18 kind of be at the table in a more informed manner.

19 We have talked with the OIC staff about one thing that
20 would be very helpful to us, to have a formal interview with
21 the OIC consultants. Premera has had access to these
22 consultants, and they've been interviewing Premera folks.
23 And I think the other two entities in this hearing have a
24 pretty good idea what the staff experts are looking at. What
25 we would like is to have our experts sit down and talk with

1 them so they can get a better idea where the focus of our
2 exploration is beyond the kind of broad generalities and the
3 scope of work in the contracts, and that way we can make sure
4 that our work is carefully targeted to issues that may be
5 looked at a little bit differently from the experts that
6 we've hired.

7 As we've mentioned in documents when we filed our motion
8 to intervene, that we've retained the help of the Policy
9 Analysis Program at the University of Washington and to look
10 at kind of health-impact issues related to the Premera
11 conversion. We wanted to make sure that it's not overlapping
12 and that it brings new information and answers different
13 questions to the table, and that it's as helpful as it can
14 be.

15 We'd like to get them started as soon as possible, and
16 one thing that we think would be very helpful is to have an
17 informal interview and so they can find out and make sure
18 that our research and our work is coordinated and not
19 redundant.

20 I think that's it for me.

21 COMMISSIONER KREIDLER: Thank you very much,
22 Ms. Hamburger.

23 In the way of -- since we appear to have some time for
24 that purpose -- before I go to Mr. Kelly, Ms. Sureau?

25 MS. SUREAU: Thank you, Commissioner. Sorry.

1 Ms. Hamburger, if you could just address for me why you
2 suggest the basis for why Premera should be required to pay
3 the costs of interviewing the consultants.

4 MS. HAMBURGER: The basis for why -- I believe that
5 they should be -- that it's a reasonable cost of the hearing
6 under the Holding Company Act which must be paid for by the
7 acquiring party.

8 MS. SUREAU: So the intervenors' interviewing of
9 the consultants, the staff consultants --

10 MS. HAMBURGER: I'm sorry. I didn't hear you.

11 MS. SUREAU: That's all right.

12 MS. HAMBURGER: We believe that it is part of their
13 procedure for doing the expert evaluation that they're doing
14 on behalf of the Insurance Commissioner and his office. And
15 one of the things, they've had plenty of interaction with
16 them and certainly for their experts to know what our folks
17 are looking at will help make their reports more targeted,
18 too, and/or at least tell us whether we should be doing it or
19 not.

20 So we think it's a reasonable cost related to the first
21 part of that Section 5(b), where they can retain at the
22 acquiring person's expense, you know, experts that may be
23 reasonably necessary in assisting the Commissioner in
24 reviewing proposed acquisitions. And we think that helping
25 to make sure that all the information that can be helpful to

1 the Insurance Commissioner is a reasonable cost related to
2 the acquisition.

3 MS. SUREAU: So, I mean, hypothetically they would
4 have been paid to consult and interview with the OIC staff
5 people, and then they would also be paid to kind of replicate
6 that experience with the intervenor people. Is that pretty
7 much the proposal?

8 MS. HAMBURGER: For instance, it may make the -- if
9 the OIC consultants in the conversation with our experts find
10 that our folks are looking at a particular question or think
11 their methodology is okay, maybe it even makes their review
12 more efficient. It seems to me that the information they may
13 get from our folks, too, may be helpful in their review of
14 the conversion proposal.

15 MS. SUREAU: Would you think that time limits on
16 those interviews would be a good idea? Would they be
17 something that the intervenor groups would accept?

18 MS. HAMBURGER: You know, I think we would be able
19 to consider a reasonable time limit. I think it would have
20 to be enough of a meeting so that our experts have an idea
21 kind of where they're exploring what the scope of their work
22 is, where they're heading.

23 MS. SUREAU: And can I ask, have time limits of
24 this nature been discussed at all? Is this a new concept?

25 MR. KELLY: We don't think it's a valuable concept.

1 We think it shouldn't occur.

2 MS. SUREAU: The interviews at all?

3 MR. KELLY: We'll explain that in rebuttal.

4 MS. SUREAU: Let me just ask you, then: Presuming
5 for the moment that interviews were ordered, would you think
6 that a time limit would be a helpful way of putting arms
7 around.

8 MR. KELLY: Well, otherwise the consultants have
9 every reason to just talk forever.

10 MS. SUREAU: So what would you think would be
11 reasonable limits? I'm trying to get some feel for what --

12 MR. KELLY: Let's go to the heart of this. This is
13 really an outrageous proposal. The intervenors are not in
14 the business of urging that Premera pay for their attorney's
15 fees or their experts. Why is it that they now have the
16 right to come in and require us to pay for them to have the
17 privilege of talking to the OIC's consultants?

18 It really is not valuable. And it will delay things,
19 and it will confuse things. Because suddenly you'll hear,
20 "Well, we relied upon that statement from the consultant."
21 And then Ms. Hamburger will have to become a witness at the
22 hearing to explain why now they feel the rug's been pulled
23 out from under them because now the consultant's doing
24 something different.

25 What would their response to be? Consider how unusual

1 it would be for me to say, "You know, I would like just have
2 an interview with your experts, Ms. Hamburger, just to help
3 things along, just to make sure no one's confused." It's
4 unheard of, would not be allowed, would be confusing, and
5 certainly adds insult to injury to make us pay for it.

6 MS. SUREAU: Thank you, Mr. Kelly. I kind of led
7 you into your rebuttal.

8 MS. HAMBURGER: I would like to just respond to
9 that.

10 COMMISSIONER KREIDLER: Sure, please.

11 MS. HAMBURGER: You know, the Insurance
12 Commissioner has put limits only on us regarding what kind of
13 information we can present at the hearing. The Insurance --
14 Premera does not have those limitations about it being
15 different on, you know, what can be offered by Premera and
16 the OIC staff. And because of that, we want to be able to
17 start to get our resources and our expert assistance as
18 efficiently and appropriately as possible. So, you know,
19 because of the difference between the different
20 responsibilities that each of those parties have, I think we
21 require a different approach.

22 Second, Premera's already had the opportunity to talk to
23 these experts. They've met with them. They've been
24 interviewed by them. They have a sense of where they're
25 going. And we don't even have that opportunity.

1 So, you know, we think it would be valuable. We don't
2 think it will delay things. In fact, we think it will make
3 things move along faster, and we don't think it will confuse
4 the matter because we will have the benefit of the final
5 reports. But in the mean time, we want to get our folks
6 started in the right direction.

7 MS. SUREAU: Thanks very much.

8 COMMISSIONER KREIDLER: Mr. Kelly, were there some
9 other matters?

10 MR. KELLY: Just a quick rebuttal. I think I would
11 start with Ms. Hamburger's remarks. I think it is important
12 on this whole question of the special master, we see it as
13 something that we are volunteering to do. We're not saying
14 that we necessarily be required to do it. We're making a
15 commitment to do it because we think it's in everyone's
16 interest and we're making that commitment to make the
17 payment.

18 I'm not sure whether they could probably -- special
19 master isn't really an expert. I don't know how you
20 characterize that. I would think that somehow adjunct or
21 assistant to the commissioner to make the rulings or make a
22 preliminary recommendation to the Commissioner which, unless
23 the parties appeal, becomes de facto with what the discovery
24 becomes.

25 Second point about agreeing to pay, I think that it's

1 interesting that the intervenors are not willing to pay if
2 they are making -- if it turns out where they're in a
3 situation where they've made an unwarranted document request.
4 It says a lot about what the scope of disputes in discovery
5 will really be. I would hope they would be willing to agree
6 to just -- we do something wrong, costs attorney fees for the
7 other side, to pay for it.

8 Well, priorities, again, I think I mentioned George
9 Finkle would be in our view the best person to do this.

10 THE REPORTER: Mr. Kelly, if you could speak up a
11 little more, please.

12 MR. KELLY: Then there's -- she made a brief
13 discussion about why haven't the documents been produced.
14 Our point is it's missing the target. You produce something
15 and then this leads to something and something else. And
16 that's just natural. That's the way people are, always
17 looking for something more. But there has to be a time to
18 put an end to this.

19 The final point on interviewing the consultants, but I
20 think maybe there's a business understanding on
21 Ms. Hamburger's part. We're not interviewing them. Our
22 major problem is they put nothing down on paper, and they are
23 committed to nothing. They are interviewing us. That's all
24 that's happened so far. And frankly, I don't think they're
25 going to hear very much. First of all, the answer will be

1 like Mr. Hamje's, "Well, you never know, you know. We're
2 still looking. We'll let you know soon, in 50 days or so.

3 And number two, Mr. Hamje, as I understand, is taking a
4 position that he should not have to produce the notes or his
5 notes of their discussions with them. I think it's going to
6 be a very short interview in reality, just repeating the same
7 thing over and over again: "We can't tell you at this
8 stage." And I hope you don't go down that path because I
9 think it will lead at the hearing to a lot of recriminations
10 and bad feelings. And it's not going to help you understand
11 what's going on, which is the primary thing that we should be
12 looking for here, rather than the convenience of the
13 intervening parties.

14 Now, to get back to the to observations of Mr. Hamje, I
15 think that's just not all that hard a task. I think if you
16 ask any judge, they will tell you you got to set the
17 deadlines because something always comes up otherwise to
18 delay things. November 26 remember we were told they
19 couldn't tell you then what the schedule is. Well, now it's
20 over three months later, and they still don't know. And I
21 understand that in one sense. We would all like to delay
22 things. There's always something else that comes up. They
23 need to have a firm deadline.

24 Now, obviously you're the decision-maker. If you are
25 presented a compelling case after you set a deadline, if one

1 party or the other hasn't cooperated or this or that is the
2 problem, you have a discretion to move the deadline. But I
3 hope -- I think the presumption is there better be a darn
4 good case for it. But to not set a deadline, it's just
5 inviting a delay.

6 Now, Mr. Hamje had a list of worries, and I've enjoyed
7 working with John, but he worries a lot. And, you know, you
8 have sort of a view in the world of a can-do or can't-do. I
9 think he's going over there to worrying too much. He's
10 worrying about these draft proposals. Suppose Premera wants
11 to change it. Let us worry about that. We're willing to
12 take the risk on that. We'd like to see a final report from
13 them. If something is really disturbing to us, I guess we'll
14 deal with it. Let's not go in presuming that's the problem
15 and build in this incredible delay to combat it, even though
16 we don't think there will be any reason to think it will be a
17 problem.

18 He raised that point that you decide when the record is
19 complete, and certainly you make the decisions here. What I
20 see happening here is -- and I'm sure it's all in good faith,
21 but it happens -- it sounds like the consultants are making
22 the decisions here. The consultants are the ones who tell us
23 when discovery is complete in their mind so that they can
24 begin discussing things.

25 That's not the way things should operate, and sometimes

1 it happens that the consultants capture the client. And I
2 don't know if that's what's happening here or not, but I just
3 find it so sacrosanct to say there's no way they can work any
4 faster. You know, Pricewaterhouse and those investment
5 bankers, if there's a hot deal and it's got to get done over
6 the weekend, they get the bodies in there and get the job
7 done. And that's because their client is saying do the work.

8 And I'm -- here Mr. Hamje understandably -- and it's not
9 his money; it's our money. And we're talking about the high
10 hundreds of thousands of dollars a month. And it really is a
11 major problem. And a four months have gone by. Now they're
12 only down to asking a few questions at that time. I guess
13 that's progress in one sense.

14 Many of the extensions built into that schedule, this
15 floating schedule that the OIC staff has, are anticipating
16 problems that may never exist. And if you think about it, I
17 haven't heard any challenge to what I said. The heart of
18 this case are expert reports. And if you get the expert
19 reports out, I'm sure that all the attorneys here will do a
20 tremendous job ferreting out what issues and concerns there
21 are in depositions because we're going to have depositions,
22 and that's the time for Mr. Hamje to come back with retorts
23 and explanations so we will have a complete record.

24 I think he's confusing. The final reports of the
25 experts are not the final record in this case, just the

1 beginning. And clearly at the hearing, that's the final
2 record, and he'll have plenty of time to fill in any holes
3 that he thinks may have happened.

4 And this point about document discovery, just quickly,
5 that was our proposal. Premiera wrote and said, "Lookit,
6 February 26th was the day or 27th was the day we sent this
7 in. You can start doing document discovery today, as far as
8 we're concerned. We need to have a protective order in
9 place, but send us your discovery requests. There's no
10 reason for delay in progressing in this case.

11 Cap on expert testimony, just an example of what is
12 really happening here. Counsel: "Well, we don't know."
13 They don't know if, after five months, whether they're going
14 to have any nonexpert testimony? That's not up to the
15 consultants; they're the experts. The OIC staff are the
16 lawyers preparing this case. Why don't they know yet whether
17 they're going to have any experts? When are we ever going to
18 know? They'll know the day you tell them what the limits is
19 and when they have to produce those. And we're no better.
20 We'll do the same thing on the day that we have to do that.

21 Rob, anything more than that document?

22 MR. MITCHELL: I have just a couple of thoughts on
23 the joint status report which Mr. Hamje and I worked on last
24 week. My name is Rob Mitchell. And there are -- I'm happy
25 to say I got a gift recently of the compact version of the

1 Oxford English Dictionary, and it came with a very nice
2 magnifying glass. So now I can actually read the exhibits to
3 the joint status report. I apologize for those.

4 But I think it's critical to recognize about the bottom
5 line, that the OIC staff and Premera pretty much agree on
6 where we are today with respect to the various requests that
7 have been made. There are, as I said, 35 -- as Mr. Kelly
8 said, there are 35,000 pages of documents have been produced
9 over the last four months, most of them months ago, 40
10 interviews of management, 20 questions that have been posed
11 formally to Premera.

12 18 consultants report that there has been a complete
13 response; two of them they say have a response but it's been
14 so recent we're still evaluating it. Our position is that
15 Premera has basically produced every document that has been
16 requested, save those that are protected by privilege and a
17 couple that involve third-party confidentiality concerns.

18 Now, we have a process that Mr. Hamje and I, on behalf
19 of our respective clients, have agreed upon to resolve the
20 remaining issues, the open issues, and we're committed to
21 doing that. And it involves, as he said, meeting regularly
22 with the consultants and then staff runs; on the 14th get
23 together and point out if there are any open issues at that
24 point, and they can be put to bed.

25 But to say that the consultants can't begin to put pen

1 to paper until that point or some point thereafter just
 2 defies belief. These people have been working for months.
 3 They've had all this time. They can do the -- if they
 4 haven't begun the reports already, I would be astounded.
 5 They certainly can operate on the basis of all the
 6 information they've been given. They are, after all, the
 7 A-team experts. All they need is a deadline.

8 Now, what Mr. Kelly has suggested is that they have 45
 9 days from the 14th of this month, which is the point at which
 10 all final disputes are to be adjudicated or resolved by the
 11 OIC staff or till the end of April to produce their reports.
 12 I cannot see how that's an unreasonable suggestion. They
 13 will not produce the reports until they're required to do so.
 14 That is the bottom line.

15 COMMISSIONER KREIDLER: Mr. Mitchell, I'm just
 16 curious, I presume that you've taken a look at the
 17 performance of these experts in other regions. Have you
 18 found that to be the record? They have not set the limits
 19 until they were told that there would be limits?

20 MR. MITCHELL: Commissioner, I have not done an
 21 exhaustive examination of what these particular experts have
 22 done in other proceedings. I can tell you that, based upon
 23 my experience as a litigator for 20 years, that's what
 24 happens. You give a deadline; it gets met. If you don't
 25 give a deadline; nothing happens.

1 COMMISSIONER KREIDLER: I'm sure they're better
2 than your past experience.

3 MR. MITCHELL: I hope so.

4 COMMISSIONER KREIDLER: Mr. Hamje, did you have any
5 comments that you wished to offer, rebuttals?

6 MR. HAMJE: I probably should address a few issues.
7 I know I've taken an immense amount of time up in my initial
8 remarks, went way over what I was supposed to do, and I
9 appreciate your indulging me in that regard.

10 I guess one -- let me address, first of all, the
11 question of these informal interviews that has been raised,
12 where intervenor groups requested that they have an
13 opportunity to informally interview the State's consultants
14 about what they're doing. We don't have an objection to them
15 sitting down and talking to the State's consultants and
16 limiting their discussion only to determining what it is
17 they're focusing on.

18 When you start talking to methodology or those other
19 issues, you're going, I think, across the line about what
20 you're getting into. It's really in terms of the -- just,
21 let's just make sure you're going to take care of this and
22 work -- "Since we're required to go -- either be different or
23 go beyond what the OIC staff and Premera would do, then we're
24 only going to do this over here and that's all, that it would
25 be just an informal discussion, brief."

1 I don't see it will last for very long, just to make
2 sure that they're not going to get into trouble, spend a lot
3 of money, and then they turn up at the hearing and say, "We
4 want to bring up all this evidence," and we say, "No. I'm
5 sorry. That was covered by Consultant X or Consultant Y."

6 Now, I do also understand very much the issue that
7 Mr. Kelly's raised, which concerns me as well, about the
8 possibility that the discussions would become evidence at
9 some point in time in disputes regarding the scope of
10 discovery or the scope of participation by the intervenors.
11 What I would suggest is that, whatever information is shared
12 in those -- in these interviews, that it cannot be utilized
13 by any party in connection with discovery disputes or the
14 presentation of case or evidence so that they -- it just --

15 This is wholly, you know, the intervenors rely on the
16 information they obtain at their own risk. And I think that
17 probably would still give them enough information so they can
18 go ahead and make sure they're not going to duplicate efforts
19 on -- that are already being handled.

20 I realize that Premiera very much wants to end this
21 process as quickly as possible. I realize that 35,000 pages
22 of material have been provided, and there's been a number of
23 interviews. Of course, that -- we've got to keep in mind
24 that the quantity alone is not the measure of the worth of
25 the information that has been imparted. We've got to

1 evaluate it. We've got to look at it. 30 -- we may need
2 180,000 pages. I'm not saying we do, but I'm just saying
3 from a hypothetical standpoint that if we need the
4 information, if the information is there, and that's
5 necessary to get the evidence that is needed for the
6 Commissioner to make a determination, then we -- just, the
7 number of pages just doesn't matter.

8 Now, that being said, I want to make it very clear that
9 we're not talking about engaging in an entire process that's
10 going to go on for months and months on this. Remember, as
11 Ms. Hamburger pointed out, Premiera has control, ultimate
12 control of that data and information. Keep in mind, even if
13 you look at Exhibit A, you will note that a great number of
14 requests were made in October. And if you trace them across
15 to the other side of the exhibit, you'll see that a number of
16 them were not supplied -- presented until February the 26th.

17 So keep in mind, it is not because -- staff is certainly
18 not suggesting that Premiera is withholding evidence or doing
19 anything in a deliberate way to frustrate the process. What
20 has happened is that this is a big task. And remember that
21 Premiera has initiated it by filing its application, and
22 Premiera has had to understand that it was going to cost
23 Premiera some money for the Commissioner to be able to have --
24 develop staff expertise, to go ahead and properly evaluate
25 the material and evaluate the transactions so that public

1 interest can be served.

2 The consultants are not controlling this process. It's
3 Premiera that is attempting to control this process. And
4 that's what's happening here is by setting arbitrary
5 deadlines, deadlines -- it's the first time I've ever heard
6 in any type of proceeding where the opposing party is trying
7 to tell the experts on the other side what they've got to do
8 to do their job.

9 That's not the way it's supposed to work here. Those
10 experts are supposed to be able to provide support, expert
11 support, to the Commissioner and to the Commissioner's staff.
12 That's the key here.

13 That's all I have at this time.

14 COMMISSIONER KREIDLER: Thank you, Mr. Hamje.

15 MS. SUREAU: May I just...?

16 COMMISSIONER KREIDLER: Briefly, yes, Ms. Sureau.

17 MS. SUREAU: Mr. Hamje, is it your understanding
18 that all documents that are not subject to some sort of
19 privilege have been produced? I know that's kind of a
20 backwards question, but...

21 MR. HAMJE: No. It's my understanding that there
22 are still some documents that have not been produced.

23 MS. SUREAU: That are not subject to a claim of
24 privilege?

25 MR. HAMJE: That's right. That's right. But I

1 don't know how much of those. If you look -- I'm working off
2 the same Exhibit A you have hopefully before you. And you
3 can go through that, and you can see the ones that say
4 "incomplete response." And those are the ones where there
5 may have been documentation or information that has been
6 incomplete. There are others that say "need to review."

7 MS. SUREAU: Yes, I have seen it, Mr. Hamje. Thank
8 you. Thank you.

9 COMMISSIONER KREIDLER: Thank you much.

10 Ms. Hamburger, any final?

11 MS. HAMBURGER: You know, just very briefly, just
12 ask you to consider in looking at the scheduling order, you
13 know, who is bearing any harm by one way or another that --
14 Premera hasn't really indicated any harm if the OIC has, you
15 know, whatever, a few more days it needs to get all the
16 information that its experts need. Whereas, I think that
17 there'll be some grave harm to the public and to our ability
18 to do discovery if the expert reports that have been
19 commissioned for this don't have all the information
20 available that they need.

21 COMMISSIONER KREIDLER: Okay. Well, I want to
22 thank you all for coming. And as I said at the beginning,
23 obviously, I will not be issuing a ruling today and will be
24 issuing a written order addressing the items addressed by the
25 joint proposal expeditiously. Thank you all very much for

1 coming. Meeting adjourned.

2 (Proceedings concluded at 2:31 p.m.)

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C E R T I F I C A T E

I, SUE E. GARCIA, a duly authorized Court Reporter and Notary Public in and for the State of Washington, residing at Tacoma, do hereby certify:

That the foregoing proceedings were taken before me on the 3rd of March, 2003, and thereafter transcribed by me by means of computer-aided transcription, that the transcript is a full, true, and complete transcript of said proceedings;

That I am not a relative, employee, attorney, or counsel of any party to this action or relative or employee of any such attorney or counsel, and I am not financially interested in the said action or the outcome thereof;

IN WITNESS HEREOF, I have hereunto set my hand and affixed my official seal this March 5, 2002.

SUE E. GARCIA, CCR, RPR
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